Supreme Court, U.S.
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No. 98-820

In The

Supreme Court of the United States

October Term, 1998

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

KENNETH CRAIG BRADY; BOBBY LEE EVANS; WILLIAM E. FORTENBERRY; JAMES ARTHUR LEACH; STEPHEN LEON SKINNER; GUY "NUBBIN" CHAMBLEE; and ANTONIO ROSAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents sued Fort Bend County, Texas, under 42 U.S.C. § 1983 and the First Amendment claiming that the sheriff did not reappoint them as deputies because of their speech and association during the 1992 sheriff's election campaign in Fort Bend County, Texas. The questions presented are:

1. Whether the Fifth Circuit erred in interpreting Texas law to hold that a county is vicariously liable, under *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), and § 1983, for a Texas sheriff's hiring decision.

2. Whether the Fifth Circuit erred under *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), in balancing the free-speech rights of the Respondents against the state's interest in prohibiting such speech, considering the facts of the case and Texas law as it governs the Texas deputy sheriff relationship.

PARTIES TO THE PROCEEDING

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STATEMENT OF THE CASE

Respondents adopt the Fifth Circuit Court of Appeals recitation of the factual and procedural background of this proceeding.[1]

The Petitioner, Fort Bend County, seeks *certiorari* upon essentially two grounds, both of which lack merit. First, it asserts that the Fifth Circuit erroneously interpreted Texas law in deeming a Texas sheriff to be a county's final policy-making official regarding appointment of deputies. In doing so, the Petitioner points to an alleged circuit split which, in fact, amounts to little more than a supposed conflict between long-standing Fifth Circuit precedent and a recent district court opinion from the Middle District of North Carolina. Second, the Petitioner contends that the Fifth Circuit erroneously applied the *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test to the facts presented.

As discussed below, there exists no basis for review in this case. The first ground raised by Petitioner urges this Court to make an exception to its general disinclination to review circuit courts' interpretations of state law, particularly with respect to states within their circuit. *See McMillian v. Monroe County, Alabama*, 520 U.S. 781, ___, 117 S. Ct. 1734, 1737 (1997). Even if this Court were to undertake such a review, it would discover that Texas law

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[1] The opinion of the Court of Appeals is reprinted at pp. 3a through 69a of the Petitioners' Appendix. The opinion is also found in the Federal Reporter. *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998).

uniformly establishes the proposition accepted by the court below. Moreover, Petitioner's argument that it bears no responsibility for its sheriff's unconstitutional conduct is fundamentally inconsistent with arguments it made to the district court; Petitioner, simply put, is estopped to now contend otherwise.

As for the suggestion that a circuit split exists, even a cursory review of the Petition for Writ of Certiorari will reveal that this argument is based not upon a disagreement among circuits, but upon an opinion issued by the U. S. District Court for the Middle District of North Carolina. The Fourth Circuit, which reviewed the trial court's opinion, never even addressed the issue upon which Petitioner bases its circuit split argument. No circuit split exists.

Finally, the Petitioner does not advocate in favor of a new balancing test to replace *Connick-Pickering*, nor should this Court create a new approach. Instead, Petitioner simply claims that the Fifth Circuit incorrectly applied the well-established test to the instant facts. Even if that were true, which Respondents deny, the Fifth Circuit's application of the law to the facts offers no reason, let alone a good one, for review by this Court. Indeed, Petitioner really prays for review because it disagrees with the result, not with the Fifth Circuit's methodology.

Accordingly, the Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The writ should be denied for three reasons:

1. Petitioner seeks review of Texas law, which the Fifth Circuit is uniquely positioned to interpret. The Fifth Circuit's interpretation in this case is consistent with its prior recitations of Texas law, the Texas courts' view, the Texas Attorney General's opinion, and even with Petitioner's own arguments to the District Court.

2. There is no circuit split.

3. Petitioner seeks review of the Fifth Circuit's application of the *Connick-Pickering* balancing test to the particular facts presented, but in no way claims that a different test should apply. The writ should be denied, then, because Petitioner simply seeks relief from the result, not from the Fifth Circuit's application of the law.

I. TEXAS LAW HOLDS THAT A SHERIFF IS A COUNTY POLICYMAKER; THE PETITIONER, THEN, SEEKS NOTHING MORE THAN TO REVERSE THE FIFTH CIRCUIT'S INTERPRETATION OF STATE LAW

In its first question presented for review by writ of certiorari, Petitioner seeks review of the Fifth Circuit's interpretation of Texas law, that is, whether the sheriff acts as a final policymaking official regarding the reappointment of deputies for Texas counties. Virtually no controversy exists among the courts regarding this question of Texas state law, and Texas law is replete with

references to sheriffs being county officers. *See e.g.*, TEX. CONST. ART. V, § 23; *Abbott v. Sheriff Pollock*, 946 S.W.2d 513 (Tex. App. – Austin 1997, no writ). Moreover, every court to address this issue, whether state or federal, has held that Texas sheriffs are final policymakers for the county which they serve. *See, e.g., Turner v. Upton County, Texas*, 915 F.2d 133 (5th Cir. 1990). *See also Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996).

Under Texas law, deputies serve "at the pleasure of the sheriff." Texas Loc. Gov't Code § 85.033(c). As the Fifth Circuit noted below, sheriffs in Texas are not merely delegated discretion to hire and fire deputies, their choice is unreviewable by any county body or official.[2] *See id.*,

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[2] Petitioner apparently assumes that there can only be one final policymaking official for the County. Of course, there may be more than one final policymaking official for the County depending on the conduct at issue. While, for example, the County Commissioners may be the final policymaking body for some County decisions, the Sheriff is the final policymaking official for hiring decisions within the Sheriff's Department. *See e.g.*, Plaintiff's Exhibit No. 16 p. SRS0406 (Sheriff's Dept Policy Manual: Personnel policies are set entirely by Sheriff without input from County Commissioners). That the County Commissioners have final policymaking power over *other* County decisions, in no way undercuts the Sheriff's policymaking role regarding his department. The Sheriff is simply an independent final policymaking official whose policy making covers the Sheriff's Department. This Court has acknowledged as much in *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, ___, 117 S. Ct. 1382, 1390 (1997). In *Brown*, this Court noted:

> The County sought to avoid liability by claiming that its Board of Commissioners participated in no policy decisions regarding the conduct and operation of the Office of the Bryan County Sheriff. *Id.* at 32.

§ 151.004; *see also Murray v. Harris*, 112 S.W.2d 1091 (Tex. Civ. App. – Amarillo 1938, writ dism'd); *Commissioners Court v. Ross*, 809 S.W.2d 754, 756 (Tex. App. – Tyler 1991, no writ). This formulation yields the inescapable result that a Texas sheriff acts for the county whose citizens elected him. *Bennett*, 74 F.3d at 586.

By that same token, as the Texas Attorney General recently confirmed, Texas law provides that a suit against the sheriff in his official capacity is nothing more than a suit against the County. Texas Attorney General Opinion Letter No. 98-103 (1998). The Fifth Circuit has likewise interpreted Texas law. *Bennett*, 74 F.3d at 584 ("Ms. Bennett's suit against the Sheriff in his official capacity is a suit against Archer County directly in everything but name"). And crucially, that is precisely the position that the County took below, when it urged the district court to dismiss the Sheriff as an official-capacity defendant on the grounds that such a suit was nothing more than a suit against the County.[3]

> Accepting the County's representations below, then, this case presents no difficult questions concerning whether Sheriff Moore has final authority to act for the municipality in hiring matters. (citations omitted).

Accordingly, it is precisely because no other municipal body or official, including the County Court of Commissioners, can impose any restraints on the Sheriff in making his hiring decisions, that the Sheriff is the final policymaking official regarding his hiring decisions.

[3] At one point in the litigation, the Sheriff of Fort Bend County, in his individual and official capacity, was a party along with Petitioner. Both parties were represented by Petitioner's counsel of record. Respondents later dismissed the Sheriff in his

A. This Court normally does not review appellate decisions regarding state law.

These issues, of course, pertain only to Texas state law. This Court has consistently emphasized that the issue of whether a particular official has final policymaking authority is a question of state law. *See McMillian*, 520 U.S. at ___, 117 S. Ct. at 1737; *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion); *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). It is well established that this Court does not normally review issues of state law which have been determined by the

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individual capacity but not in his official capacity. Afterwards, the County moved to dismiss the Sheriff in his official capacity arguing that a suit against the County joined with an action against the Sheriff in his official capacity was redundant because the Sheriff and the County were the same:

> the claims remaining are only claims against Fort Bend County sued in two forms, as an entity, and through the office of the Sheriff. Such claims are clearly redundant as cited in all the authority set forth in the County's motion.

See Respondents' Appendix, p. 3. Later, the County added:

> the wording of 42 U.S.C. § 1983 in no way "compels" Molina to be included as a party defendant, and has absolutely no substantive effect on the Plaintiffs' claims in that it only includes his office, not his person.

See Respondents' Appendix, p. 4. Accordingly, the County (not the Sheriff, R. George Molina) moved for dismissal of "any claims against R. George Molina in his official capacity, the office of sheriff, as duplicitous of the claims against Fort Bend County." *See* Respondent's Appendix, pp. 4-5. The district court granted the County's motion and dismissed the sheriff in his official capacity.

Courts of Appeals. *See Equality Foundation of Greater Cincinnati, Inc., et al. v. City of Cincinnati, et al.*, ___ U.S. ___, 119 S. Ct. 365 (1998) (Justice Stevens respecting the denial of the petition for a writ of certiorari); *Bishop v. Wood*, 426 U.S. 341, 346-47 (1976). This Court, then, should follow its tradition of leaving interpretations of state law to the circuit courts. The Petition for Writ of Certiorari should be denied.

B. This Court normally defers to the judgment of the appellate court concerning state law within its jurisdiction.

Moreover, this Court normally "defer[s] considerably" to the judgment of appellate courts when they construe state law within their jurisdiction. *McMillian*, 520 U.S. at ___, 117 S. Ct. at 1737; *see also Jett v. Dallas I.S.D.*, 491 U.S. 701, 738 (1989) ("[W]e think the Court of Appeals [for the Fifth Circuit], whose expertise in interpreting Texas law is greater than our own, has a better position to determine whether [the school district superintendent] possessed final policymaking authority in the area of employee transfers."); *see also Pembaur*, 475 U.S. at 484 ("We generally accord great deference to interpretation application of state law by the Court of Appeals."). This deference is especially applicable here where each of the Fifth Circuit panel members are based in Texas.

This Court should therefore defer to the Fifth Circuit's conclusion that Texas law makes Texas sheriffs final county policymakers with respect to appointment of deputies. The Petition for Writ of Certiorari should be denied.

II. THERE IS NO CIRCUIT SPLIT REGARDING THE STATUS OF A TEXAS SHERIFF AS A COUNTY POLICYMAKER.

A. There is no circuit split because the law regarding sheriffs varies from state to state.

Petitioner argues that there is a split in the circuits regarding the issue of whether the sheriff is a county policymaker. In suggesting, first of all, that the Fourth Circuit has held to the contrary, Petitioner overlooks the dependence on state law in resolving this issue. With respect to the sole issue in this case, whether under Texas law a Texas sheriff is a county policymaker, no court has ever held that a Texas sheriff exercising any duty, whether it be responsibility for the jail or making employment decisions for deputies, is anything but a county policymaker. Significantly, Petitioner offers no authority to the contrary, let alone another circuit court holding that the Fifth Circuit's interpretation of Texas law is incorrect.

B. Petitioner claims that an ambiguous holding of a district court regarding North Carolina sheriffs constitutes a circuit split.

Even if one ignored the crucial role that state law plays in resolving this issue, there still is no circuit split. Contrary to Petitioner's suggestions, the Fourth Circuit's opinions in no way support its arguments. Strangely, the case that forms the basis of Petitioner's argument that a circuit split exists is a district court opinion, *Harter v. Vernon*, 953 F. Supp. 685 (M.D.N.C. 1996), *aff'd*, 101 F.3d 334 (4th Cir. 1996). Although the Petitioner notes that the

district court's opinion was affirmed by the Fourth Circuit, it fails to advise this Court that the cited portion of the trial court's opinion was neither appealed nor reviewed by the Fourth Circuit. In fact, the Fourth Circuit's opinion concerned only a denial of the sheriff's qualified immunity. The plaintiffs in *Harter* did not cross-appeal the district court's rulings regarding the sheriff's policymaker status, and the appellate court did not reach that issue. *Harter*, 101 F.3d at 336.

In fact, the Fourth Circuit noted that the district court granted summary judgment "explaining that, in its view, Vernon [the sheriff] 'was not acting pursuant to a policy of the county' and 'under state law the sheriff is not an agent of the county in employment decisions.' " *Harter*, 101 F.3d at 336. The Court then expressly noted that:

> the Eleventh amendment ruling is the only issue presented for our review. We do not address, and we express no opinion as to the correctness of, any of the district court's other holdings.

Id.

In the other Fourth Circuit case cited by Petitioner, *Greensboro Professional Firefighters Assoc. v. Greensboro*, 64 F.3d 962 (4th Cir. 1995), the court merely held that a North Carolina *fire chief* lacked final policymaking authority over employee/employer relation decisions, a role it deemed was reserved for City Council and the City Manager. That a different state vests a different sort of municipal authority with a different body or officer in no way speaks to the Texas law question presented in this case. The Fourth Circuit's opinion, then, is neither controversial nor indicative of a circuit split. In short, there

exists no appellate case from any circuit which is any way inconsistent with the opinion below.[4]

In short, the issues regarding the sheriff's policy-maker's status are routine and well-established. There is no controversy among the Courts of Appeals and the Petition for Writ of Certiorari presents no novel issue. It should be denied.

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[4] Interestingly, Petitioner also claims that there exists an intra-circuit conflict and cites the Fifth Circuit opinion of *Gunaca v. State of Texas*, 65 F.3d 467 (5th Cir. 1995), as a holding contrary to the opinion below. This is truly a red-herring, however. First, *Gunaca* involved a district attorney and not a sheriff. Second, the Fifth Circuit is well-situated to regulate internal inconsistencies among its decisions. In this case, the Fifth Circuit denied rehearing *en banc*. *See* Petitioner's Appendix, p. 2a. The Fifth Circuit apparently disagreed with any suggestion that its opinion in this case conflicted with its other precedents. Third, Petitioner fails to mention that *Gunaca's* author served on the underlying panel in this case. Surely, that panel possesses great expertise in interpreting its court's law, especially when one of its members wrote the opinion that Petitioner claims is inconsistent. Finally, the Fifth Circuit expressly considered this claim and rejected it, noting that *Gunaca* does not control the issues in the *Brady* case. *Brady*, 145 F.3d at 700, n. 2. Of course, a fair reading of *Gunaca* indicates the same. The other case cited by Petitioner in this regard, *Williams v. Bagley*, 875 S.W.2d 808 (Tex. App. – Beaumont 1994, no writ), offers no support for Petitioner's arguments. In fact, *Williams* confirms that the sheriff is a county official.

III. THE *CONNICK-PICKERING* BALANCING TEST IS WELL ESTABLISHED AND THERE IS NO NEED TO CONDUCT ANOTHER REVIEW OF THE FACTS UNDER THIS TEST

The County does not dispute that the *Connick-Pickering* balancing test applies to the underlying factual setting where public employees complain that they were fired because of political speech. There seems to be little dispute that both the District Court and the Court of Appeals applied the *Connick-Pickering* balancing test to the underlying facts. Instead, Petitioner asks this Court to re-examine the application of the *Connick-Pickering* balancing test to these specific facts. The jury heard two weeks of evidence in this case, most of which related to facts relevant to the *Connick-Pickering* balancing test. The District Court re-examined these facts and applied the *Connick-Pickering* test pursuant to post-trial motions. The Fifth Circuit then affirmed after conducting its own exhaustive and thorough review of the facts under the same test. Petitioner now seeks a fourth review of these facts pursuant to *Connick-Pickering*.

Even if this Court were inclined to conduct yet another fact-intensive *Connick-Pickering* review, this case is not the proper one to review. Under the balancing test, of course, the County's interest in promoting harmony and efficiency in employment must ultimately be balanced against the employees' free speech rights. In this case, however, the record reflects little government interest, if any, in squelching the public employees' free speech rights. The policymaking decisionmaker in this case, the Fort Bend County Sheriff, testified very clearly that there existed no legitimate governmental interest in

failing to rehire the Respondents, or any other person, because of their political speech. *Brady*, 145 F.3d at 710. He further confirmed that a deputy's political speech and campaign activities against him would not present any problem in working under him at the Sheriff's Department. *Id.* This testimony, recited at length in the Fifth Circuit's opinion, typifies the uniformity of opinion from the jury to the Fifth Circuit regarding the test's application in this case.

Put simply, Respondents' rights to free speech overwhelmingly outweighed what little interest the government had in prohibiting such speech. Even the government actor, the Sheriff, was hard-pressed to state why, if at all, the government had an interest, let alone one outweighing Respondents' rights. The state interest in promoting harmonious and efficient employment was not furthered by making decisions based upon political activities because the Sheriff, himself, confirmed that those activities would not affect a deputy's ability to perform harmoniously and efficiently.

Most notably, Petitioner ignores the lack of any legitimate governmental interest in failing to rehire Respondent public employees because of their speech. Accordingly, there is nothing for this Court to re-evaluate that has not already been exhaustively analyzed by the Court of Appeals.

In short, Petitioner simply does not like the result and wishes to have this Court reapply the same test to reach a different result. It does not ask this Court to change the test. Since the test applied below is the proper one, there is no good reason for this Court to consider a case in which the overarching legal principles are already established and sound.

IV. THERE IS NO CIRCUIT SPLIT REGARDING THE BALANCING TEST; THERE ARE ONLY VARYING RESULTS BECAUSE OF A WIDE VARIETY OF FACT PATTERNS AND STATE LAW ISSUES PRESENTED.

The alleged "circuit split" in the decisions cited by the Petitioner is illusory. The *Elrod-Branti* political patronage test[5] and the *Connick-Pickering* political speech test are both fact and state law intensive. Under such tests, it is not surprising that varying results would be reached.

First, the character, content, mode and method of the employee's speech must be carefully examined. The fact-intensive inquiry regarding the public concern inherent in the speech, as well as the countervailing threat to efficient job performance that the speech raises, are critical factors to these tests. Moreover, the factual details regarding the employee/employer relationship are crucial. Often, as it was in this case, the relationship will be governed by state law. It surely cannot be said that there exists any uniformity of the sheriff's position in all fifty states. As this Court has already recognized, there are different forms of county government in different states therefore, "it is entirely natural that both the role of sheriffs and the importance of counties vary from state to state . . . " *McMillian*, 520 U.S. at ___, 117 S. Ct. at 1742.

For example, in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 881 (1998), the

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[5] *See Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion), and *Branti v. Finkel*, 445 U.S. 507 (1980).

Court specifically based its decision on North Carolina law and the role of North Carolina sheriffs.[6] *Jenkins*, 119 F.3d at 1163. The Fifth Circuit, in reviewing the circumstances underlying this case, thoroughly reviewed Texas law as it applies to sheriffs and to sheriff's deputies, in addition to thoroughly examining the speech engaged in by the Respondents.

None of the other cases cited by Petitioner present any conflict with the Fifth Circuit's opinion. In fact, the cases cited by the Petitioner do not even support its argument. Strangely, the Petitioner boldly states to this Court that the Fifth Circuit's opinion is in "square conflict" with the Sixth Circuit. In no case, however, has the Sixth Circuit ever held that sheriff's deputies do not enjoy first amendment protections. In fact, quite the opposite is true. *See Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997).

The Sixth Circuit case cited by the Petitioner, *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992), does not even suggest such a proposition. In *Cagle*, the court held that the sheriff, in his individual capacity, enjoyed qualified immunity because the law as of the time the hiring decisions were made was not clearly established. *Cagle*, 957 F.2d at 1350. Importantly, the Court did not dismiss the plaintiff's case against the sheriff in his official capacity and, in fact, remanded for further proceedings on that issue. Nowhere in *Cagle* may be found the proposition that no first amendment right exists.

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[6] This Court denied review of the *Jenkins* case earlier this year. Of course, the alleged "circuit-split" existed then as much as it supposedly does now. In fact, no such split exists.

Furthermore, the Eleventh Circuit's opinions in this regard reflect the same balancing approach that the Fifth Circuit has used. Petitioner cites the Eleventh Circuit's opinion of *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), as holding that a deputy sheriff has no First Amendment right according to the Eleventh Circuit. Actually, in *Terry v. Cook*, the Eleventh Circuit held that, under Alabama law, given the legal relationship between sheriffs and deputies, those deputies did not enjoy political patronage protection. However, the Eleventh Circuit has also held that deputies in other states, such as in Georgia, do have First Amendment protection. *Brett v. Jefferson County*, 123 F.3d 1429, 1432 (11th Cir. 1997). Importantly, however, the Court did not hold that sheriff deputies, as a rule, enjoy no first amendment protection. *See also Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992). The Eleventh Circuit has never recognized this as any kind of intra-circuit "split" nor should it, given the myriad of possible fact situations involving sheriff's deputies. Of course, this is because each case must be examined under its own specific facts as has been well established by this Court, and therefore, given different factual settings, different results occur.

The Petitioner points to the Seventh Circuit's decision in *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), but that, too, was a qualified immunity case. The case does contain dicta to the effect that the deputy's relationship with the sheriff was so close that they should be considered policymakers under *Elrod-Branti*. That dicta, however, results from a factual inquiry, as well as the legal nature of the sheriff/

deputy relationship under Illinois law. Morever, the dicta was unnecessary to the final decision.

In *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993), where the Seventh Circuit specifically denied the claims of deputy sheriffs under the First Amendment, the court specifically analyzed the employees' speech noting, in support of its result, a number of peculiarities about the state and the counties in which the plaintiffs filed their lawsuit, as well as noting the fact-dependent "aggressive" nature of the employees' speech. Likewise, the court pointed to the existence of a local collective bargaining agreement which provided that only probational deputies could be discharged for political reasons. The court also noted that the employee's "aggressive" patronship at the tavern suggested his presence in the sheriff's department would not foster the necessary cooperation among the approximately 15 deputies, the chief deputy and the sheriff of Price County. Factually, then, the Seventh Circuit's application of the legal test in *Heideman* is readily distinguished from the underlying facts, in which none of the Respondents, contrary to Petitioner's suggestion, engaged in openly hostile speech towards the sheriff of Fort Bend County.

To be sure, none of the cases cited by Petitioner are in square conflict with the Fifth Circuit's opinion here nor, to the extent any conflicts exist, do they result from more than the application of well-settled law to the specific facts presented. In this regard, again, it should be noted that because the court is applying a balancing test, the same court has reached different results even for the

same position. This, however, does not amount to a conflict in federal law between the Circuits.[7]

Finally, to the extent there could possibly be any conflict even in the courts' interpretations governing widely divergent factual situations, this case presents very little in the way of evidence supporting the state's balancing test. In this case, the Sheriff of Fort Bend County who decided not to reappoint the Respondent deputies specifically testified that no deputy needed to support him in order to perform his job and suggested no disharmony that would result as a result of supporting the other candidate. *See Brady*, 145 F.3d at 710. Moreover, in this regard, it was Petitioner's argument at trial that the Sheriff of Fort Bend County did not make decisions based upon political affiliation or political speech at all.

Given the above factual setting, it can hardly be argued that the County had a compelling need to have deputies who politically supported the winning sheriff in the electoral campaign. While arguably, in other factual settings, another sheriff might have an interest in terminating a deputy because their speech causes disharmony, no such allegation was made here.

This is surely not a proper case for review, then, because the evidence of any state interest borders between scant and nonexistent. The Petition for Writ of Certiorari should be denied.

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[7] At most, this would involve a conflict between courts applying arguably similar facts or a conflict regarding the interpretation of *state law*.

Dated: December 18, 1998.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

KENNETH CRAIG BRADY, ET AL	§	CIVIL ACTION NO. H-93-441
vs.	§	JURY TRIAL DEMANDED
FORT BEND COUNTY and R. GEORGE MOLINA	§	

FORT BEND COUNTY'S REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Defendant, Fort Bend County, files this Reply to the Plaintiffs' Response to the Defendants' Motion to Dismiss the Plaintiffs' Newly Added Claims in the Plaintiffs' Fourth Amended Complaint, and would show in support as follows:

1. Plaintiffs don't dispute that they included in their Fourth Amended Complaint a number of claims which are completely unrelated to their political retaliation claim, including claims of deprivation of due process, liberty interest, and denial of equal protection, and apparently have agreed to amend their Fourth Amended Complaint to dismiss such claims. Inexplicably, at the same time, Plaintiffs suggest in their usual overstated and disingenuous fashion that they find the requested dismissal a "surprise to Plaintiffs because, they have no, and are not, asserting any liberty interest claim or claim arising under the procedural due process clause of the Fourteenth Amendment."

2. Perhaps, due to the overzealous advocacy of their attorneys, the Plaintiffs present the somewhat ridiculous notion to this Court that the Defendant should allow the Plaintiffs to include claims of a completely different character than the ones they intend to pursue within the body of their complaint, and that any motion to dismiss such claims would be "wholly frivolous"! Equally perplexing is the notion advanced by the Plaintiffs that it is improper for the County to complain of newly added claims in the Plaintiffs Complaint after the motion cut-off deadline (suggesting that they were free to amend their complaint in any manner they chose following the Court's most recent Order of Consolidation). The County accepts the Plaintiffs' stipulation that no liberty interest, due process or equal protection claims are being asserted in this litigation.

3. Plaintiffs further claim that they previously alleged termination due to partisan affiliation. With respect to the motion to dismiss partisan affiliation claims, the Plaintiffs did not contest the Fifth Circuit's understanding, the Court in its order on the Defendants' Motion for Summary Judgment, and that of the undersigned, that no complaint was made whatsoever as to partisan affiliation (versus political activity). *Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995). It was, of course, admitted that Plaintiff Rosas had made such a complaint. However, the Defendant now stands partially corrected based upon the few paragraphs among hundreds contained within the previous complaints which suggest that Plaintiffs were terminated as a result of their affiliation with the Republican party. The Complaints are attached to the

Plaintiff's Response. Defendants submit that no such claim has been adequately stated.

4. Finally, however, the Defendant moves for dismissal of the claims against Molina in his official capacity. Plaintiffs single out a decision cited by the County which they contend is inapplicable since it deals with the ability to sue state officials rather than county officials under §1983. By doing so, the Plaintiffs miss the point. Undisputedly, the claims against Molina in his individual capacity have been completely dismissed from this lawsuit. Therefore, the claims remaining are only claims against Fort Bend County sued in two forms, as an entity, and through the office of the Sheriff. Such claims are clearly redundant as cited in all the authorities set forth in the County's motion.[1] Apparently, Plaintiffs wish to suggest to the jury that Molina is a Defendant in the instant lawsuit when he is not. There is absolutely no basis for the duplicitous claims, and to prevent confusion to the jury and prejudice to the Defendant, Fort Bend County, the redundant claims against Molina should be dismissed.

5. The Plaintiffs want to have their cake and eat too. They dismissed Molina soley [sic] for the purpose thwarting the Fifth Circuit's jurisdiction over the appeal, foregoing any claim to punitive damages, or damages from Molina. However, they wish to keep him in as a named

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[1] *Stump v. Gates*, 777 F.Supp. 808, 816 (D.C. CO 1991) ("Therefore, although some courts have overlooked it, naming a municipal department as a defendant is not an appropriate means of pleading a §1983 action against a municipality . . . naming either is sufficient. Naming both is redundant.").

Defendant apparently so that they can inform the jury that he is a Defendant when he is not. The wording of 42 U.S.C. §1983 in no way "compels" Molina to be included as a party defendant, and has absolutely no substantive effect on the Plaintiffs' claims in that it only includes his office, not his person.

6. Of course, a pleading from the Plaintiffs in this case would be incomplete without a suggestion of dilatory motive on behalf of the Defendant. Of course, as usual, there is no reason to infer any such intent.[2]

7. For these reasons, the Defendant, Fort Bend County, prays that this Honorable Court dismiss all claims within the Plaintiffs' Fourth Amended Complaint beyond those relating to retaliation and violation of the Fist [sic] Amendment based on political activity alone, and further any claims against R. George Molina in his official

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[2] It is truly a novel concept that the prosecution of an interlocutory appeal, particularly where the Fifth Circuit has granted the issues *en banc* consideration, is a dilatory tactic. No other action taken by the Defendants has suggested any intent to delay the trial of this matter, nor in fact cause any such delay. The Defendants have never moved for a continuance of the trial setting nor suggested any such intent. Plaintiffs' misleading suggestions should not be rewarded or given any legitimacy through their repetition or the vigor with which they are stated.

capacity, the office of sheriff, as duplicitous of the claims against Fort Bend County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the following counsel of record by certified mail, return receipt requested, hand-delivery, and/or facsimile transmission, on this 7th day of December, 1995, as follows:

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No. 98-820

In The

Supreme Court of the United States

October Term, 1998

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

KENNETH CRAIG BRADY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. RESPONDENTS ARE INCORRECT IN ARGUING THAT THIS CASE INVOLVES ONLY ONE STATE'S LAW.

A. That this case involves an interpretation of Texas substantive law, which is similar to the law of numerous other states, does not preclude certiorari.

Respondents' first argument, that Petitioner seeks nothing more than to reverse the Fifth Circuit's interpretation of Texas law, ignores the plethora of other states which have enacted laws similar, if not identical, to Texas regarding the authority of officials to make appointments. (Pet. for Cert. at 11). Citing *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 117 S.Ct. 1734 (1997), Respondents urge this Court to turn the other cheek and defer to the Court of Appeals' interpretation of state law. However, such concerns obviously did not prevent this Court from granting certiorari in *McMillian*, in which the Court interpreted Alabama law in determining whether the county sheriff acted for the state or the county. Thus, Respondents' first argument does not support denial of certiorari in this case.

B. The conflict between the Fifth and Fourth Circuits is not fact-sensitive. It is a clear conflict of legal interpretation.

The County is in complete agreement with Respondents' statement of the letter of Texas law. The issue before this Court, however, is the effect of that law, and numerous similar laws throughout the country, on county

or municipal liability for an official's appointment decisions. Respondents do not substantively address this issue anywhere in the entire Brief in Opposition.

The Fourth Circuit's opinion in *Greensborough Prof. Fire Fighter's Assoc. v. City of Greensborough*, 64 F.3d 962 (4th Cir. 1995), varies from this case in one respect: it involved the appointment decisions of a fire chief instead of a sheriff. That single difference is immaterial to the clear circuit split on the compelling legal issue. *Greensborough* shows that a fire chief's appointment authority under North Carolina law is comparable to the appointment authority possessed by Sheriff Molina here. Indeed, as discussed, *infra*, the Fourth Circuit, sitting en banc, has also rejected liability in the context of a sheriff's appointment decisions. *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 881 (1998). Strikingly absent from Respondents' Brief is a substantive attempt to distinguish *Greensborough* on the merits. Instead, Respondents assert that it should be disregarded only because it involves a state other than Texas. Such an argument only emphasizes the County's point as to the nationwide importance of the issue and further supports why certiorari should be granted here – other states have similar laws which cause the same type of disputes as those involved here.

At its most fundamental level, Respondents' Brief is urging this Court to accept the Fifth Circuit's tacit embracing of *respondeat superior* liability in the context of § 1983, a theory this Court has repeatedly rejected. (*See* Pet. for Cert. at 13, 21). The reality of the situation, though sometimes harsh, is that deputies similarly situated to Respondents will have to sue the sheriff directly.

Ultimately, deputies might not obtain money damages, but they may be entitled to reinstatement or other equitable relief.[1]

C. The County's position on appeal does not conflict with its arguments below.

Respondents have sheepishly contended that the County is estopped from arguing against county liability because it moved the district court to dismiss the sheriff in his official capacity after Respondents voluntarily dismissed the sheriff individually. (Brief Opp. at pp. 5-6). This argument is frivolous. In the trial court, after Respondents dismissed the sheriff in his individual capacity, they attempted to amend their complaint to raise numerous new allegations. The County moved to dismiss those claims, and in its reply to Respondents' response to that motion, the County urged the court to dismiss Sheriff Molina in his official capacity because that claim was merely duplicative of the claims asserted against the County. The only parties in the suit at that time were Fort Bend County and Sheriff Molina in his official capacity. The County merely urged the court to dismiss Molina in his official capacity to prevent confusion to the jury and eliminate redundant claims. At no time in the trial court did the County expressly or impliedly take the position that it *could* be liable for Molina's appointment decisions. In fact, it expressly asserted, based on this Court's holdings, that it could not be liable

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[1] However, whether the sheriff is entitled to indemnity from a county, as he was here, is not determinative of whether the county is a proper party to the suit.

because the sheriff was not the County's final policy-maker. That the County moved the court to dismiss Molina in his official capacity involves a narrow, and distinct, issue and is not in conflict with the positions urged by the County here.

Also, it is interesting that Respondents waited until this stage of the proceedings to make such an argument instead of promptly urging it in the Fifth Circuit. Had Respondents raised that issue in the Court of Appeals, the Fifth Circuit would have had the opportunity to address it. As the record stands now, Respondents have waived their "estoppel" argument.

II. RESPONDENTS SUGGEST THAT JUDGE EDITH JONES WAS WRONG WHEN SHE IDENTIFIED, IN A PUBLISHED OPINION, THE EXISTENCE OF A CONFLICT AMONG THE CIRCUITS. SHE WAS NOT WRONG.

In Judge Edith Jones' published opinion resulting from the interlocutory appeal, she noted the existence of other circuit opinions which have "expressly authorized exactly what Sheriff Molina is alleged to have done here." *Brady v. Fort Bend County*, 58 F.3d 173, 174 (5th Cir. 1995) (Pet. for Cert. at App. 64a-65a). In her opinion, Judge Jones expressed a desire for the en banc Fifth Circuit to re-evaluate its alignment with other circuits on the issue, *Brady*, 58 F.3d at 175 (Pet. for Cert. at App. 65a-66a); and the court clearly intended to do so when it granted the County's suggestion for rehearing en banc. This review was avoided only by Respondents' prompt dismissal of

their claims against the sheriff, individually, after rehearing en banc was granted. Respondents, however, are apparently of the impression that Judge Jones was wrong.

Highlighting the conflict is the Fourth Circuit's en banc decision in *Jenkins*. *Jenkins*, 119 F.3d at 1156. Indeed, the Fourth Circuit itself was at odds over the outcome of *Jenkins*, as indicated by the dissenting opinions filed. *Jenkins* is on point. Respondents' paltry attempt to distinguish it again hinges on the mere fact that it involves North Carolina law. Thus, Respondents miss the point entirely (or attempt to evade it) because it is apparent from the *Jenkins* opinion that North Carolina law is identical to Texas law concerning the appointment authority of sheriffs. Additionally, Respondents make no attempt to distinguish *Jenkins* factually.

In *Upton v. Thompson*, 930 F.3d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), the Seventh Circuit approved a sheriff elect's decision to discharge several deputies who had opposed the sheriff's party affiliation. The case involved Illinois law, which notably provided that deputy sheriffs are subject to at-will dismissal by the sheriff. *Id.* at 1210. Here, as set forth in the County's Petition for Writ of Certiorari, Texas law (and the law of so many other states) provides that deputies serve at the sheriff's pleasure. The *Upton* court concluded, among other things, that political considerations are an appropriate requirement for the effective performance of a deputy sheriff and that deputy sheriffs operate with "a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Id.* at 1218.

Additionally, Respondents' attempt to convince the Court that *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), does not contribute to the clear circuit conflict is mysterious considering that Respondents expressly acknowledged that *Terry*, in fact, held that sheriff's deputies did not enjoy political patronage protection. (Brief Opp. at 15). In *Terry*, deputy sheriffs sued under § 1983 claiming that they had been discharged, or not re-appointed, for political reasons. *Id.* at 374. The Eleventh Circuit affirmed the dismissal of the deputies' § 1983 claims and in so doing analyzed the statutory powers of sheriffs and deputies under Alabama law, which are consistent with the law in Texas. "We can find no less restrictive means for meeting the needs of public service in the case of sheriff's deputy than to acknowledge a sheriff's absolute authority of appointment and to decline to reinstate those who did not support him." *Id.* at 377. This is flatly contrary to the Fifth Circuit's conclusion in this case.

The cases cited by Petitioner, which are at odds with the Fifth Circuit, do not represent a fact-bound application of law because they involve identical law and very similar facts. Because they reach diametrically opposed results by way of reasoning which is clearly contrary to the Fifth Circuit's analysis here, they are not fact-sensitive cases. Rather, the County's argument emphasizes an ongoing problem within several circuits, which impacts uniformity in every day practice at the district court level. The problem has yet to be clearly and squarely resolved.

CONCLUSION AND PRAYER

Respondents' Brief in Opposition raises no credible grounds for denying certiorari. It fails to meet head on the critical issues in the case and instead resorts to misleading attempts to characterize the issues in this case as only involving Texas state law and a frivolous estoppel argument. Because the cases cited by the County demonstrate that the problems raised in the instant matter continue to persist on a nationwide scale, this Honorable Court should grant the petition for writ of certiorari.

Respectfully submitted,

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